TAN TEK SENG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MUAR
RICHARD TALLALA JC
[CRIMINAL APPEAL NO. 52-2 OF 1988]
1 APRIL 1990

CRIMINAL LAW: *Criminal breach of trust - Section 409 Penal Code - Section 173A Criminal Procedure Code - Factors to be considered in setting aside conviction and sentence.*

The appellant was charged with 2 counts of criminal breach of trust under s. 409 of the Penal Code. The breach of trust related to his position as the headmaster of a primary school; the monies misappropriated being the unpaid salary of the school gardener who had failed to report for work for several months. The appellant was charged and sentenced and is now appealing against that conviction and sentence.

Held:

[1] The prosecution, in establishing criminal breach of trust, is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion.

[2] The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lend to an inference of dishonest misappropriation or conversion.

[3] Conviction of a person for the offence of criminal breach of trust may be proved where the person concerned is unable to account or renders an explanation for his failure to account which is untrue. In such circumstances, an inference of misappropriation with dishonest intent may readily be made.

[4] It is clear on the facts of this case that the prosecution had established a *prima facie* case against the appellant.

[5] On the facts of this case, there was not much criminality in the appellant's action and the offences were committed under extenuating circumstances. It is a borderline case suitable for the exercise of s. 173A of the Criminal Procedure Code - see *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 56.

[Conviction and sentence set aside appellant discharged conditionally.]

Cases referred to:

Mohamed Adil v. PP [1967] 1 MLJ 151
J.M. Desai v. State of Bombay [1960] AIR SC 889
PP v. Loo Choon Fatt [1976] 2 MLJ 256

Legislation referred to:

Criminal Procedure Code, s. 173A
Penal Code, s. 409

For the appellant - R. K. Menon; M/s. R.K. Menon & Co.
For the respondent - Jalal Din (Federal Counsel)

JUDGMENT

Richard Tallala JC:

The appellant was charged with having on 15 November 1983 committed criminal breach of trust of a sum of RM3,179 belonging to Jabatan Pelajaran Johor, he being a public servant namely the headmaster of Sekolah Rendah Jenis Kebangsaan China, Kangkar Baru entrusted with the same, an offence punishable under s. 409 of the Penal Code. He was likewise charged with criminal breach of trust on 10 December 1983 of a sum of RM3,468. The money was the unpaid salary of the school's gardener who had failed to report for work for several months. He was found guilty of the offences charged and sentenced to 6 months imprisonment in respect of each charge. He now appeals against conviction and sentence.

Upon a perusal of the record of appeal and having heard Counsel for both the appellant and the respondent it seemed clear to me that the prosecution had established a *prima facie* case against the appellant in respect of both the charges upon which the appellant was rightly called upon to make his defence. The grounds of judgment of the learned Sessions Court Judge are clear and correct. By reference to the charge the accused as headmaster of the school was required by regulation to return the unpaid salary to the Department of Education within 21 days. He did not do so. It was only on 15 June 1987 that he returned the money to the department. That was more than 1 year after he was charged. The department had written to him for the money. His reply was that the money had been sent to them. The department then wrote asking him to state the number of the cheque and receipt in respect thereto but received no reply.

The appellant elected to give evidence on oath and accordingly testified. A perusal of his testimony did not disclose anything pointing to his having discharged the onus placed on him to satisfy the Court that he had a reasonably probable answer to the case which the prosecution had established. My attention was drawn to the case of *Mohamed Adil v. PP* [1967] 1 MLJ 151, where Ismail Khan J, as he then was, referred with the apparent approval to a number of Indian decisions on the question of dishonest intention relative to a charge of criminal breach of trust. One of the decisions was the case of *J.M. Desai v. State of Bombay* AIR [1960] SC 889 where at p. 891 Shah J said:

> ... to establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of to an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion.
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> Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made.

The explanation of the appellant for retaining the money was that by reason of his transfer he became confused (bingung), worried (runsing) and disappointed and injured in his feelings (kecewa) and also because at one time he wished to return the money but a cheque was mislaid. He said he cashed the 2 cheques in question in order to make it easier to balance the bank account at the end of the month. He gave no effective explanation for keeping the money so long before returning it to the department. He told a lie when in answer to the department's request for payment he said the money had been sent to them. I consider he was rightly found guilty of the offences charged.

In regard to sentence the appellant joined the Government as a teacher as far back as 7 January 1957. He was a teacher at Sekolah Rendah Jenis Kebangsaan (Cina) Kangkar Baru from 1 August 1973 to 29 February 1984. He was born in 1938 and therefore 45 years old at the time of the offence. Except for this episode he would appear to have had an unblemished record. Holding such a position and having had such a long period of service as a public servant it struck me as being extraordinary and indeed incredible that the appellant should have risked his profession and effectively a life time of service to profit from as little as six and a half thousand dollars. The appellant in retaining the money would appear to have acted out of sheer stubbornness and cussedness. He would appear to have retained it because he was upset with the department over his transfer and some accusations the department had supposedly made against him. To make things worse his wife was always quarreling with him over his alleged association with a lady teacher. He was confused, at a loss as to what to do. All this I gather from his saying "Saya jadi bingung". He was worried, anxious (runsing). He was disappointed and injured in his feelings (kecewa).

He took the money, not stealthily but openly in the presence of the clerk in the school office. He did not spend the money but kept it in his house. He eventually returned it to the department in full. Unfortunately he told a lie in answer to the request for payment and kept the money too long. I do not see much criminality in the appellant's action or more appropriately I should say the offences were committed under extenuating circumstances. It is a border line case, one suitable for exercise of the power given under s. 173A of the Criminal Procedure Code. Accordingly pursuant thereto I set aside the conviction and sentence imposed by the learned Sessions Court Judge and discharge the appellant conditionally upon his entering into a bond of RM5,000 without sureties to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during a period of 3 years from this date.

I should add that the provisions of s. 173A have been applied after much thought and a consideration of the special circumstances of this case. In this regard I have in mind all that was said by the learned Judge in *PP v. Loo Chon Fatt* [1976] 2 MLJ 256.

Also found at [1990] 2 CLJ 103